In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1525

VINCENT SUNDRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was improperly prosecuted for violation of a statute which was repealed after the commission of the offenses alleged in the indictment; that evidence of his failure to keep records required by law was improperly used to prove another offense; that he was interrogated in violation of this Court's ruling in *Miranda* v. *Arizona*, 384 U.S. 436; and that his motion for a new trial should have been granted due to the alleged psychological incompetence of a government witness.

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of distributing amphetamine tablets unlawfully and conspiring to do so, in violation of 18 U.S.C. 371, former 21 U.S.C. 331(q)(2), and 21 U.S.C.

841(a)(1) and 846; and failing to keep complete and accurate records of certain drugs, including amphetamines, in violation of former 21 U.S.C. 331(q)(4). He was sentenced to concurrent terms of one year's imprisonment, suspended except for thirty days. A motion for a new trial was denied (Pet. App. 1a-5a), and the court of appeals affirmed (Pet. App. 6a-7a).

1. Petitioner, a physician, conducted a "diet practice," in connection with which he received large orders of amphetamines from pharmaceutical firms. He supplied substantial quantities of the pills to one William Kleppner, who then sold the amphetamines, principally to truck drivers, and divided the profits with petitioner (Kleppner Tr. 26).[1] On two occasions, Kleppner sold a total of 26,000 pills to an undercover agent of the Federal Bureau of Narcotics and Dangerous Drugs for more than $2000, and shared the proceeds with petitioner (Kleppner Tr. 14, 22). Petitioner told Kleppner that the shortage of pills could be covered up, because petitioner's office had been burglarized (Kleppner Tr. 23-24). Petitioner was Kleppner's only supplier of amphetamines (Kleppner Tr. 28). The government introduced into evidence a tape recording made by Kleppner, containing a conversation between Kleppner and petitioner, which corroborated Kleppner's testimony regarding his illicit drug venture with petitioner (Tr. 339-347).

On June 30, 1971, agents of the Bureau of Narcotics and Dangerous Drugs went to petitioner's office and, pursuant to a warrant, inspected petitioner's records regarding acquisition and distribution of amphetamines. They also counted the tablets in petitioner's possession. Based on the agents' calculations, it appeared that there

[1] The testimony of William Kleppner was separately transcribed.

was a shortage of more than one million tablets over the one year period between July 1, 1970, and June 30, 1971 (Tr. 18, 109-111, 169, 175). More than 900,000 pills were unaccounted for as of May 1, 1971, the last date cited in the indictment. Petitioner asserted that he had dispensed more amphetamines to his patients than his records reflected, and that about 500,000 pills were taken from his office in various burglaries (Tr. 502). Despite this explanation, there was an unexplained shortage of approximately 250,000 amphetamines.

2. Petitioner contends that he was improperly prosecuted under 21 U.S.C. 331(q)(4) because that statute was repealed prior to the institution of proceedings against him.[2] Section 702(a) of the repealer, however, contains a "saving" provision, which states:

> Prosecutions for any violation of law occurring prior to the effective date of section 701 shall not be affected by the repeals or amendments made by such section, or abated by reason thereof.

Clearly, the antecedent of "occurring" is "violation," not "prosecutions." Therefore, petitioner could properly be prosecuted under former 21 U.S.C. 331(q)(4) for a violation occurring, as the indictment alleged, from July 1, 1970 to May 1, 1971, although the prosecution did not begin until after the repeal took effect on May 1, 1971. Petitioner contends only that the repeal immunized him from prosecution for his earlier offense. This contention

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[2] 21 U.S.C. 331(q)(4) expired on May 1, 1971, the effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, tit. II, §701(a), 84 Stat. 1281. The former section had made illegal "the failure to prepare or obtain, or the failure to keep, a complete and accurate record with respect to any [stimulant or depressant] drug. Pub. L. 89-74, §5, July 15, 1965, 79 Stat. 226, 232.

is contrary to the language and unmistakable intent of the savings clause of the repealer. See 1970 U.S. Code Cong. & Admin. News 4627. The savings clause of Public Law 91-513 allows prosecution under the old statute. In any event, even in the absence of a saving provision, 1 U.S.C. 109 permits prosecution under statutes no longer in effect when the proceedings are commenced. In these circumstances, petitioner was not subjected to "ex post facto punishment" (Pet. 6). His acts were criminal when committed, and he was therefore on notice that he was criminally liable for failure to keep records of amphetamine distribution. This is the necessary consequence of the two savings clauses as they were interpreted and applied by this Court recently to preserve the applicability of other drug laws replaced by the 1970 Comprehensive Drug Abuse Act. See *Bradley* v. *United States,* No. 71-1304, decided March 5, 1973. See also *Bouie* v. *City of Columbia,* 378 U.S. 347, 353, and cases cited therein.

3. Petitioner asserts that his failure to keep records under former 21 U.S.C. 331(q)(4) could not properly have been used on the charge of conspiracy to distribute drugs unlawfully. The evidence was used at trial to show the discrepancies between the amount of amphetamines received by petitioner and the amount accounted for by distribution to his patients.

Congress enacted the statute in question as part of a program to record the entire chain of distribution of dangerous drugs, from the manufacturer to the ultimate consumer. The purpose of the legislation was to "permit federal inspectors to conduct an audit program which would reveal diversion of the drugs from legitimate channels and thus would aid effective regulation." S. Rep. No. 337, 89th Cong., 1st Sess., p. 6. Under these

circumstances, it is clear that Congress intended the proper authorities to have the power to pinpoint the diversion of drugs from lawful to illicit channels, and to prosecute persons guilty of such abuse. In this setting, it is inconceivable that Congress intended to immunize from prosecution the entire class of persons required to keep records of distribution. See *Shapiro* v. *United States*, 335 U.S. 1, 15.[3] See also *Davis* v. *United States*, 328 U.S. 582, 589-590.

Marchetti v. *United States*, 390 U.S. 39, on which petitioner relies, is inapposite, since in that case registration as a gambler and payment of a wagering tax in themselves "had the direct and unmistakable consequence of incriminating petitioner." 390 U.S. at 49. This Court distinguished *Shapiro* on that basis, since "the requirements at issue in *Shapiro* were imposed in 'an essentially non-criminal and regulatory area of inquiry' while those here are directed to a 'selective group inherently suspect of criminal activities.'" 390 U.S. at 57 (citation omitted). See also *Grosso* v. *United States*, 390 U.S. 62, 65; *Leary* v. *United States*, 395 U.S. 6, 18. Here, as in *Shapiro*, however, the record-keeping requirement in the instant case had a public purpose in regulating an ordinarily legitimate business activity, and evidence of the failure to keep such records could properly be used as proof of petitioner's illegal activities.

4. Petitioner contends that his statements to narcotic agents during the search of his office were inadmissible under *Miranda* v. *Arizona*, 384 U.S. 436. It is undisputed that petitioner was informed of his *Miranda* rights prior to the search of his office (Tr. 488). One of the

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[3] In *Shapiro*, this Court upheld a conviction for violation of price control measures, based on evidence obtained from records the defendant was required to keep.

agents testified that he later asked petitioner questions concerning his education and medical practice, which petitioner readily answered (Tr. 133). The agent also said that petitioner was not under arrest at that time, that he was free to leave the office, and that he continued to treat patients while the agents examined his records (Tr. 138, 142). Petitioner testified that he had consulted with his attorney before any questioning took place and that he gave the agents no information concerning his education or practice (Tr. 155, 158).

Petitioner now contends that he made statements concerning the nature and size of his practice which were used against him at trial. Since petitioner admittedly had consulted his attorney prior to answering any questions (Tr. 154-155, 534), his subsequent decision to supply information against the advice of counsel can reasonably be interpreted as a waiver of his right to remain silent.

5. Petitioner contends that the district court erred in denying his motion for a new trial, which was based on the alleged "psychological instability" of William Kleppner, a government witness. Kleppner had testified that he had told the undercover narcotics agent that he could obtain unlimited amounts of amphetamines, because he thought the agent to be a major dealer and had to pretend to be one too. He explained to the jury, "Well, this is the way you do in that kind of a business. You're either big or you're little, and they don't fool around with little people" (Kleppner Tr. 13-14). On cross-examination, Kleppner admitted the falsity of his statements made to the undercover agent, saying, "Yes, I am a liar" (Kleppner Tr. 66). From this remark, petitioner has chosen to infer that Kleppner was a pathological liar. The context, however, shows that

Kleppner made false statements in connection with his drug transactions for the specific purpose of making his plan succeed, and not that he was a habitual liar. The courts below specifically found that the witness was competent and that his testimony was essentially consistent, so that the issue of his credibility was properly left to the jury (Pet. App. 3a). This ruling is correct. See *Glasser* v. *United States*, 315 U.S. 60, 77. We note also that Kleppner's testimony was corroborated by his tape recording of a conversation in which petitioner plainly demonstrated his criminal complicity (Tr. 339-347).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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